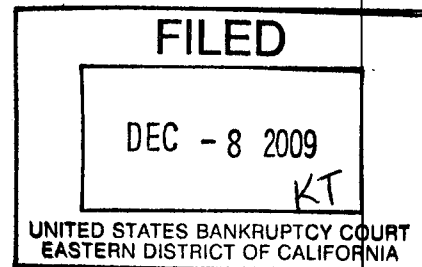


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NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re
ANTHONY MARTIN PAROLISE,
dba Parolise Chiropractic,

Case No. 07-10503-A-13
DC No. IRS-1; DRJ-5; MNE-1

FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE DEBTOR'S
MOTION TO CONFIRM THIRD
MODIFIED PLAN; THE TRUSTEE'S
MOTION TO DISMISS; AND THE
MOTION OF THE INTERNAL REVENUE
SERVICE TO DISMISS THE CASE

Debtor.

A hearing was held September 29, 2009, on the debtor's motion to confirm a third modified plan (DRJ-5); the motion of the chapter 13 trustee to dismiss the case (MNE-1; and the motion of the Internal Revenue Service ("IRS") to dismiss or convert the case (IRS-1). Following the hearing, the court took the matter under submission. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined in 28 U.S.C. §157(b)(2)(A) and (L).

Background Facts.

Anthony Parolise filed his chapter 13 case on February 26, 2007. On that same date, he filed a chapter 13 plan, which was confirmed by order entered April 17, 2007. He then moved to

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1 modify the confirmed plan by filing a First Modified Chapter 13
2 Plan on January 2, 2008. An order confirming the First Modified
3 Plan (the "Plan") as amended was entered April 21, 2008.

4 On September 21, 2009, the debtor filed a Third Modified
5 Plan. Prior to that date, the trustee had moved to dismiss the
6 case based on the debtor's failure to make payments required
7 under the Plan. Also, the IRS had moved to dismiss or convert
8 the case. The motion of the IRS was based on the debtor's
9 failure to file all prepetition tax returns for taxable periods
10 ending the four year period preceding the date that the petition
11 was filed and for the debtor's failure timely to file
12 postpetition tax returns and pay taxes. At the hearing on these
13 two motions to dismiss, the parties all agreed that it was
14 appropriate to advance the hearing on confirmation of debtor's
15 Third Modified Plan, previously set for October 29, 2009, to
16 September 29, 2009. As agreed, the debtor filed his Corrected
17 Third Modified Chapter 13 Plan (the "Third Modified Plan") on
18 September 30, 2009.¹ The IRS filed its objection to confirmation
19 of the Third Modified Plan on October 14, 2009. All three
20 matters were deemed submitted as of October 116, 2009.

21 To summarize the procedural discussion, the chapter 13
22 trustee moved to dismiss the case based on the debtor's failure
23 to make payments, but filed a statement of non-opposition to
24 confirmation of the Third Modified Plan. The IRS asks that the
25 case be dismissed or converted to chapter 7 and opposes

26
27 ¹The Corrected Third Modified Plan altered the Third
28 Modified Plan filed on September 21, 2009, to reflect the correct
amount of post-petition taxes owed.

1 confirmation of the Third Modified Plan. The debtor asks that
2 the court confirm the Third Modified Plan as filed September 30,
3 2009.

4 The IRS has filed two proofs of claim. Claim No. 7 states a
5 claim for prepetition taxes owed in the amount of \$154,420.96.
6 Claim No. 7 was amended by Claim No. 19, which states that the
7 amount of the claim of the IRS as of the date the case was filed
8 was \$137,031.19. The IRS has not filed a proof of claim for its
9 postpetition taxes. However, the IRS has filed a Declaration of
10 Insolvency Advisor describing that the debtor had failed to pay
11 postpetition taxes due and owing and had also failed to file tax
12 returns for federal unemployment taxes, federal income taxes, and
13 federal employment taxes. The debtor acknowledges in the Third
14 Modified Plan at paragraph 7.02 that:

15 "The Debtor currently owes \$81,793.99, to the Internal
16 Revenue Service for various unpaid taxes that accrued after
17 the commencement of this case, and \$9,677.53 to the
Employment Development Department, also for various unpaid
taxes that accrued after the commencement of this case."

18 The parties acknowledge that the purpose of the Third
19 Modified Plan is to deal with the postpetition taxes due to the
20 IRS and the Employment Development Department. In his
21 declaration in support of confirmation of the Third Modified
22 Plan, the debtor states:

23 "I am current in payment of my plan payments but I am not
24 current in the payment of taxes that have accrued
25 postpetition and are due to the IRS and the EDD. I need to
26 reduce my plan payments to enable me to catch up with my
post-petition taxes . . . My income has not kept pace with
original projections. My modified plan will fund payment of
my priority claims and certain of my secured claims."

27 The Third Modified Plan provides at paragraph 7.02 that:

28 "The Debtor shall pay at least \$1,140.00, to the IRS on or

1 before October 1, 2009. Beginning on November 1, 2009, the
 2 Debtor shall pay at least \$3,150.00, a month to the IRS and
 3 at least \$382.00, a month to the Employment Development
 4 Department for application to these taxes. These payments
 5 are calculated to coincide with the amount necessary to pay
 6 the taxes plus penalties and interest in full within the
 7 next 30 months. So long as the Debtor remains current in
 8 the payment of these payments, the automatic stay herein
 9 shall remain in full force and effect as to the IRS and the
 10 Employment Development Department with respect to efforts by
 11 them to collect from the Debtor via levy or any similar
 12 device."

13 The objection of the IRS to confirmation of the Third
 14 Modified Plan is based on the debtor's failure to comply with
 15 § 1308(a) and § 1325(a)(9) and on the ground of feasibility.
 16 Section 1308 requires a debtor to have filed no later than the
 17 date of the first meeting of creditors, all prepetition tax
 18 returns for all taxable periods ending the four year period
 19 preceding the filing of the petition. In this case, the debtor
 20 did not do that. Section 1325(a)(9) requires that for a plan to
 21 be confirmed, the debtor has filed all applicable Federal, State
 22 and local tax returns as required by § 1308.

23 The IRS also argues that the plan is not feasible. The IRS
 24 observes that the debtor has not been able to remain current with
 25 his ongoing tax obligations in the last two years and there is no
 26 reason to believe that he will be able to do so now.

27 Legal Analysis.

28 Bankruptcy Code § 1329 deals with modification of a plan
 after confirmation. Section 1329(a) states, as relevant here,:

"At any time after confirmation of the plan but before the
 completion of payments under such plan, the plan may be
 modified, upon request of the debtor, the trustee, or the
 holder of an allowed unsecured claim, to -

- (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
- (2) extend or reduce the time for such payments;
- (3) alter the amount of the distribution to a creditor

1 whose claim is provided for by the plan to the extent
2 necessary to take account of any payment of such claim
other than under the plan;"

3 Another relevant section is § 1305. Section 1305 has to do
4 with the filing and allowance of postpetition claims. Section
5 1305(a)(1) states that a proof of claim may be filed by any
6 entity that holds a claim against the debtor for taxes that
7 become payable to a governmental unit while the case is pending.
8 Thus, the IRS could have, but did not, file a proof of claim for
9 the postpetition taxes that have accrued since this case was
10 filed.

11 Section 1329(a) provides certain constraints for
12 modification of a plan after confirmation. As relevant here, in
13 order to modify the treatment of a claim under the plan, the
14 claim must be "provided for by the plan." Neither party has
15 addressed whether the original plan as confirmed or the First
16 Modified Plan as confirmed "provides for" the postpetition claim
17 of the IRS. Section 6.02 of the Plan requires the debtor to
18 comply with applicable non-bankruptcy law. It states:

19 "Debtor's financial and business affairs shall be conducted
20 in accordance with applicable non-bankruptcy law including
the timely filing of tax returns and payment of taxes."

21 Also, both the original Plan and the First Modified Plan do
22 provide for payment of unsecured claims entitled to priority
23 under § 507, including the claim of the IRS and the Employment
24 Development Department. However, the fact that they provide for
25 the prepetition claim does not necessarily mean that they
26 provide for the postpetition claim.

27 This conflict is addressed in Lundin's treatise on chapter
28 13.

1 "Unfortunately, there is little in § 1329(a) to suggest
2 that Congress contemplated postconfirmation modification to
3 provide for the payment of postpetition claims. Once
4 again, the use of the words 'provided for' becomes
5 important. Section 1329(a) states that a confirmed plan
6 can be modified to 'increase or reduce the amount of
7 payments on claims of a particular class *provided for* by
8 the plan.

9 If the original plan is silent with respect to postpetition
10 claims, then it cannot be said that postpetition claims are
11 a particular class *provided for* by the plan."

12 Keith M. Lundin, Chapter 13 Bankruptcy, 3d ed. § 261.1 (2000 &
13 Supp. 2004) (footnotes and citations omitted).

14 Lundin goes on to say that if a confirmed plan did not
15 specify payment for postpetition claims, then § 1329(a)(2) is no
16 help at modification after confirmation.

17 Also, here the IRS has not filed a proof of claim for
18 postpetition taxes. Under § 1322(b)(6), a chapter 13 debtor may
19 provide in the plan for the payment of all or any part of any
20 claim allowed under § 1305. Section 1322(b) is applicable to
21 modifications under § 1329. As Lundin goes on to state,

22 "If the holder [of a postpetition claim] declines to file a
23 proof of claim, most courts hold the postpetition claim is
24 not allowable and cannot be provided for under §
25 1322(b)(6). This interpretation of sections 1305 and
26 1322(b)(6) has inspired many courts to reject
27 postconfirmation modification to provide for the payment of
28 postpetition claims when the postpetition claim is not
allowable under § 1305." Id.

A Virginia bankruptcy court held that § 1329 does not
permit modification to provide for postconfirmation taxes when
the taxing authority declines to file a proof of claim. Id.; In
re Dickey, 64 B.R. 3 (Bankr. E.D. Va. 1985).

But there are additional reasons to deny confirmation of
the Third Modified Plan. In order to approve the

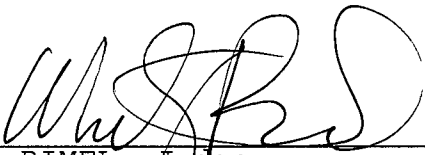
1 postconfirmation modification of a plan, the debtor must satisfy
2 his burden of proof that he meets the requirements of § 1325(a),
3 including § 1325(a)(6), that he "will be able to make all
4 payments under the plan and to comply with the plan." Here, the
5 debtor has failed to meet his burden of proof that the plan is
6 feasible. The only evidence in support of confirmation of the
7 Third Modified Plan is the debtor's declaration. That
8 declaration is conclusory. The debtor simply states that his
9 modified plan "will fund payment" of his priority claims and
10 some of his secured claims. There is no evidence of what is
11 different now from when the case was filed. The debtor does
12 state that Amended Schedules I and J show his current income and
13 expenses. But there is nothing to persuade the court that
14 Schedules I and J are an accurate projection of future income.
15 The debtor has simply not met his burden of proof that the plan
16 is feasible.

17 Additionally, the IRS makes a reasonable argument that a
18 debtor who has accrued over \$80,000 in postpetition unpaid tax
19 obligations and who has failed timely to file postpetition tax
20 returns should not be allowed to confirm a Third Modified Plan
21 to deal with the postpetition tax default. Indeed, the form
22 chapter 13 plan used in this district provides that a debtor
23 with a confirmed plan shall not incur new debt exceeding \$1,000
24 without first obtaining court authorization. (Sec. 6.02). In
25 essence, the debtor here has been financing the operation of his
26 business with an involuntary loan from the taxing authority.

27 For all the reasons set forth above, the debtor's motion to
28 confirm the Third Modified Plan will be denied by separate

1 order. The motion of the trustee and the motion of the Internal
2 Revenue Service to dismiss the case will be granted; provided
3 however that the debtor shall have seven days from entry of the
4 order accompanying these findings of fact and conclusions of law
5 to convert to chapter 7 if he wishes.

6 DATED: December 8, 2009.

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8 
9 WHITNEY RIMEL, Judge
United States Bankruptcy Court

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
 COUNTY OF FRESNO)

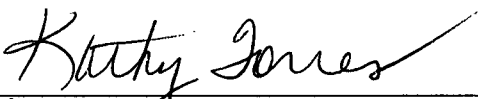
I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within above-entitled action; my business address is 2500 Tulare Street, Suite 2501, Fresno, California, 93721. On December 8, 2009, I served the within document on the interested parties in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Fresno, California, addressed as follows:

David R. Jenkins, Esq.
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 Special Assistant U. S. Attorney
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I certify (or declare), under penalty of perjury, that the foregoing is true and correct. Executed on December 8, 2009, at Fresno, California.



 Kathy Torres, PLS